Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 17, 1996

Ms. Lan P. Nguyen
Assistant City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251-1562

OR96-0559

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38550.

The City of Houston (the "city") received a request for certain information pertinent to a facility, "the Summit," comprising:

1. The most recent management agreement for the facility;

2. The most recent budget for the facility;

3. The most recent food and beverage concessionaire agreement for the facility; and

4. The most recent food and beverage budget for the facility

The city has already released information responsive to numbers one and two of the categories and has determined that it has no information responsive to number four. However with reference to number three, the city submits the most recent food and beverage concessionaire agreement for review and contends the requested agreement is excepted from required public disclosure under section 552.110 of the Government Code as commercial information.

Since two third parties' privacy or property interests were implicated in the instant request, this office did contact ARA Leisure Services of Texas, Inc. ("ARAMARK") and Arena Operating Company ("AOC") affording them the opportunity to assert any applicable exceptions to disclosure. The entities submitted a joint response and asserted, in addition to the city's commercial information exception, the argument that AOC, a private business, is not subject to the Open Records Act.

Section 552.002 (a) of the Government Code provides that information is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained by a governmental body or for a governmental body and the governmental body owns the information or has a right of access to it. The city states that "[t]his document was made available to the City." We conclude that the document is in the possession of the city for the purposes of the Open Records Act under section 552.021(a) of the Gov't Code. *See* Open Records Decision No. 549 (1990) at 3-4.

Additionally it is asserted that the document was provided to the city with the understanding that it is of confidential nature and not disclosable. A governmental body may not enter into an agreement to keep information confidential except where specifically authorized to do so by statute. Open Records Decision No. 444 (1986), 437 (1986). The city has not provided or referenced any authority which allows it to enter into confidentiality agreements, therefore, we conclude Exhibit 3, the document in the city's possession, is subject to the Open Records Act. ARA and AOC contend that section 552.104 of the Government Code except the requested records from required public disclosure. The primary purpose of section 552.104 is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Thus, because the city did not raise section 552.104, we conclude that the city may not withhold the documents under this exception.

Section 552.110 excepts from disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." We shall address both prongs of section 552.110. The first prong deals with trade secrets which embodies six factors to be assessed in determining whether information qualifies as a trade secret.[1] We believe that neither the city nor ARO and

---

[1]These six factors are

> 1) the extent to which the information is known outside of [the company's] business; 2) the extent to which it is known by employees and others involved in [the company's] business; 3) the extent of measures taken by [the company] to guard the secrecy of the information; 4) the value of the information to [the company] and to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

ARAMARK have established a prima facie case that any of the information in Exhibit 3 constitutes a "trade secret" to be withheld from the public pursuant to section 552.110 of the Government Code. *See* Open Records Decision No. 552 (1990). Accordingly, we conclude that Exhibit 3 may not be withheld under the trade secret exception under section 552.110.

The second prong of section 552.110 involves, "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Our recent Open Records Decision No. 639 (1996) recognizes *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) as the principal federal case interpreting Exemption Four of FOIA, the federal counterpart of the commercial information prong. The *National Parks* test for the treatment of commercial or financial information as confidential is: "if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770 (footnote omitted). This is now the test employed in our evaluation of claims under the commercial information prong of section 552.110. Open Records Decision No. 639 (1996) at 3.

Of critical importance in the instant case, as noted in Open Records Decision No. 639 (1996), is that a business enterprise cannot succeed in a *National Parks* claim by mere conclusory assertion of a possibility of commercial harm. "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted), "the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure."

A review of the responses received from the city, ARAMARK, and AOC reveal only general assertions that disclosure of the rights and privileges granted or the calculation of concession fees charged would cause substantial harm to the competitive position of AOC and ARAMARK in future negotiations with other vendors of the facilities. No information is presented to explain specifically how the harm would occur other than the assertion that "substantial harm" will occur if the agreement is revealed. Additionally, the city states in its letter to this office that the document was made available to the city "for approval," so that the agreement was not voluntarily provided but provided under some unstated term of compulsion. Thus, the disclosure of the agreement will not impair the city's ability to obtain such information in the future, because the information is required to be provided for approval.

(Footnote continued)

Restatement of Torts § 757 comment b (1939); *see also* Open Records Decision No. 232 (1979), *supra.*

We therefore conclude that Exhibit 3 may not be withheld under any of the exceptions claimed and that it must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

Ref.: ID# 38550

Enclosures: Submitted documents

cc: Mr. Denis Clive Braham
Winstead, Sechrest & Minick
910 Travis Street, Suite 1700
Houston, Texas 77002-5895
(w/o enclosures)

Mr. Wayne H. Lazarus
Stokes, Lazarus & Carmichael
80 Peachtree Park Drive, N.E.
Atlanta, Georgia 30309-1320
(w/o enclosures)